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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF FEMINISTS FOR LIFE OF AMERICA, PROFESSIONAL WOMEN'S NETWORK, BIRTHRIGHT, INC., LEGAL ACTION FOR WOMEN, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS & CROSS PETITIONERS

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INTEREST OF AMICI

Amici, representing women from all walks of life, are compelled by experience and conviction to advocate strongly that this Court reverse the vulnerable position of women caused by the lack of information given to women contemplating abortion. Amici respectfully urged this Court to affirm the ruling of the Court below, supporting the efforts of the women citizens of the Commonwealth of Pennsylvania to cause that government to exercise its police power to protect their health and safety by compelling the dissemination of the information necessary to make a fully informed decision.

SUMMARY OF ARGUMENT

The provision of factual information regarding the risks and consequences of a medical procedure to a prospective medical patient merely respects the common law right of the patient to receive or refuse medical treatment—her "freedom of choice." *Cruzan v. Missouri Dept. of Health*, 110 S. Ct. 2841, 2851 (1990). The Commonwealth of Pennsylvania, through its Abortion Control Act, 18 PA. CONS. STAT. ANN. § 3205 (1983 & Supp. 1991), has ensured "that her consent is informed and freely given and is not the result of coercion." *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 442 (1983), *citing Planned Parenthood v. Danforth*, 428 U.S. 52, 85 (1976). *See also, Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 760 (1985).

The Abortion Control Act under review in this case, and specifically § 3205 thereof, does not partake of the "flaws" of the ordinance found unconstitutional in *Akron v. Akron. Thornburgh*, 476 U.S. at 800 (White, J., dissenting). It should be upheld as constitutional.

This statute regulates only commercial speech. Therefore, it need not pass a strict scrutiny test. *Board of Trustees v. Fox*, 492 U.S. 469, 480-81 (1989). Moreover, the Pennsylvania Abortion Control Act does not compel adoption or transmission of ideology; it only compels pro-

vision of factual information. Therefore, the constitutional failings of the City of Akron's abortion informed consent ordinance, *Akron v. Akron*, 462 U.S. at 444, are not implicated here.

This Court should affirm the holding of the Third Circuit Court of Appeals, and rule that the Pennsylvania Abortion Control Act is constitutional in its entirety. Specifically, as amici will demonstrate, the informed consent provision of the statute, § 3205, violates neither the constitutional rights of the prospective abortion patient nor those of the physician. This Supreme Court should uphold the statute of the Pennsylvania legislature whereby it has sought to protect the woman's right to receive or refuse medical treatment.

ARGUMENT

I. THE RATIONAL BASIS TEST IS THE PROPER STANDARD OF REVIEW FOR PENNSYLVANIA INFORMED CONSENT PROVISIONS.

This Supreme Court has agreed to hear the constitutionality of the regulatory provisions of the Pennsylvania Abortion Control Act. *Planned Parenthood v. Casey*, Nos. 91-744, 91-902, 60 U.S.L.W. 3492 (U.S., 1992). The threshold issue when reviewing the constitutionality of a statute is to determine the applicable standard or test. As Justice O'Connor has noted in another Equal Protection context, "a dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not. The standard of review establishes when the Court and Constitution allow the Government to employ racial classifications." *Metro Broadcasting Inc. v. F.C.C.*, 111 L. Ed. 2d 445, 492 (1990) (O'Connor, J., dissenting).

Similarly, in reviewing Pennsylvania's abortion legislation, the Third Circuit correctly observed that

> the threshold question is whether the standard of review of abortion regulations promulgated by the Court in *Roe* and later cases . . . has survived

> *Webster* and the Court's subsequent decision in *Hodgson v. Minnesota*. . . . [T]he standard of review used for abortion legislation establishes the degree to which the government may regulate abortion.

Planned Parenthood v. Casey, 947 F.2d 682, 687-88 (3d Cir. 1991) (citations omitted).

In *Roe v. Wade*, 410 U.S. 113 (1973), a majority of Justices held that the "right" to an abortion was a fundamental liberty interest under the Fourteenth Amendment, requiring the application of strict scrutiny to any statute impeding such a "right." 410 U.S. at 152-53. The majority conceded that a state had continuing interests throughout pregnancy in the health of the pregnant woman and in the preservation of potential life. The Court held, however, that those interests did not ripen into a compelling interest until the second and third trimesters respectively. *Id.* at 162-63.

In contrast, dissenting Justices opined that abortion was but an ordinary liberty interest under the Fourteenth Amendment, and that state legislation restricting abortions need pass only a rational relation test. *Id.* at 173 (White and Rehnquist, JJ., dissenting). *See, Williamson v. Lee Optical*, 348 U.S. 383, 487 (1955).

To those Justices who embraced the *Roe* strict scrutiny test, the standard became strict indeed. There was little that states could do beyond the very limited verbal formulas in *Roe* itself to further their legitimate interests.[1] Such a rigid limitation was unusual for Supreme Court jurisprudence. Even the now discredited case of *Lochner v. New York*, 198 U.S. 45 (1905), which established the fundamental right of contract, ultimately permitted a

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[1] *See, e.g., Akron v. Akron* (voiding first and second trimester hospitalization requirements and informed consent provisions); *Colautti v. Franklin*, 439 U.S. 379 (1979) (viability standard struck down for vagueness); *Bellotti v. Baird*, 428 U.S. 132 (1976) (parental consent without bypass struck down); *Danforth* (striking down spousal and parental consent requirements, prohibition of abortion by saline amniocentesis, and standards of physician care).

range of state protections for workers when sufficient justification was proffered.[2]

It was in response to the atypical rigidity of the *Roe* formula that Justice O'Connor offered her telling critique and alternative formulation in *Akron v. Akron*, a view she has maintained and refined in each of her subsequent opinions.[3] Justice O'Connor found that "[o]ur recent cases indicated that a regulation imposed on 'a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion."' " *Akron v. Akron*, 462 U.S. at 453 (citations omitted). She emphasized that an undue burden would be present only "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation " 'inhibit[s]' abortions to some degree." *Id.* at 464. If there were no undue burden, then Justice O'Connor would apply a rational basis test. This standard would be applied "throughout the entire pregnancy without reference to the particular 'stage' of the pregnancy involved." *Id.* at 453, 460-61. Only if the petitioner could demonstrate an undue burden on the abortion right would a strict scrutiny criterion be applied.

At the same time, a growing number of other Justices came to see the constitutional inadequacy of *Roe*, and continued to hold that state regulation of abortion need meet only a rational relation test. In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), these two trends converged to change both the standard of review and the state of the law.

The plurality hinted that the right to an abortion was merely an ordinary interest, thus requiring only a rational relation between state regulation and the state's

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[2] *Lochner* itself upheld New York's safety restrictions placed on employers and workers. 198 U.S. at 62. *See also, Bunting v. Oregon*, 243 U.S. 426 (1917) (sustaining maximum hours legislation for all factory workers); *Muller v. Oregon*, 208 U.S. 412 (1908) (sustaining maximum hours legislation for women).

[3] *See* particularly her dissent in *Thornburgh*, 476 U.S. at 828-29.

ends. *Id.* at 519-20. Justice O'Connor applied her undue burden test and found no such burden. *Id.* at 530. Missouri's requirements of viability and testing and its prohibition of non-therapeutic abortions in state facilities were upheld. The fact that the requirements of *Webster* were found constitutional, overruling a court of appeals holding based on *Roe*, clearly shows that the strict scrutiny standard has been eliminated.

Although the bare holding of *Roe* remained intact after *Webster*, there has been a marked shift in the standards applied by a majority of the Court. For the plurality, the patent illogic in *Roe's* trimester formula, earlier exposed by Justice O'Connor in *Akron v. Akron*, demonstrated that there was no fundamental liberty interest at bottom. For Justice O'Connor, the screen of the undue burden test was a sufficient grounding to apply the rational basis test without the need to overturn *Roe* altogether.

This combination of the undue burden standard and the rational relation standard served to validate parental notification statutes with judicial bypass provisions in *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990). When confronted with the Pennsylvania Abortion Control Act, the Third Circuit accurately perceived that the bare strict scrutiny test of *Roe* was no longer the law of the land since *Webster*, *Hodgson*, and *Ohio v. Akron*.

It correctly applied *Marks v. United States*, 430 U.S. 188 (1977), to find the undue burden test to be the narrowest basis among the Justices of the Supreme Court upon which to decide the issues before it. The court of appeals found that the informed consent provisions "cause[] nowhere near the kind of burden that must result for a regulation to constitute an undue burden" on the woman's "right" to an abortion, and that the regulations easily satisfied the rational relation test. *Planned Parenthood v. Casey*, 947 F.2d at 704-06.

Whatever the differences in the opinions of Justice O'Connor and her brethren in *Webster*, *Hodgson*, and *Ohio v. Akron*, there has been convergence on a basic point, viz., either because the regulations in those cases did not impose an undue burden, or because abortion was only an ordinary liberty interest, statutes regulating the incidents of abortion, such as informed consent, are subject to a rational relation test. Indeed, even the older *Roe* majority conceded the principle—though not then its application—that informed consent was "clearly" a legitimate concern of the states. *Akron v. Akron*, 462 U.S. at 446. As demonstrated *infra*, Pennsylvania's informed consent provisions do not pose an undue burden upon the pregnant woman, and they further the legitimate state interests in the health of the pregnant woman and in her informed choice of abortion or childbirth.

II. THE PENNSYLVANIA STATUTE PROTECTS A WOMAN'S RIGHT TO RECEIVE OR REFUSE MEDICAL TREATMENT.

A. The Inherent Risks to the Woman of Legal Abortion Justify Standard Regulation of That Medical Procedure.

A woman has a common-law right to receive or reject medical treatment. *Cruzan v. Missouri Dept. of Health*, 110 S. Ct. at 2851. In order to be effective, her decision must be fully informed.

A woman's decision to terminate the life of her unborn child is final and irrevocable. It is a decision which this Supreme Court has recognized to be wrought with stress, *Akron v. Akron*, 462 U.S. at 442, 448. As will be demonstrated *infra*, this section, the emotional, psychological and physiological repercussions can be long-lasting and destructive. Abortion is a decision that should be made, if at all, only after careful consideration of all relevant factors,[4] for "abortion is inherently different from other

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[4] *See*, NATIONAL ABORTION FEDERATION STANDARDS FOR ABORTION CARE (1987), supporting the necessity of providing women with all relevant information as to the risks and benefits of the abortion procedure prior to obtaining consent.

medical procedures because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).

It is irrefutable that there are many known medical risks associated with abortion, regardless of its "legality" or "illegality."[5] While there is debate regarding the true complication rate,[6] there is a well-established pattern of potentially lethal complications of abortion, including cardiac arrest, hemorrhage, infection, inflammation of the heart, water intoxication, septic shock, disseminated intravascular coagulation, amniotic fluid embolism,[7] pulmonary embolism, salt poisoning, swelling of the brain,[8] and death.[9] Despite these dangers, legal abortions can

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[5] Kaunitz, *Causes of Maternal Mortality in the United States*, 65 OBSTETRICS & GYNECOLOGY (May 1985); *see, e.g., Manaskie v. Rosenblume*, No. 15028-83 (N.Y. 1983) *in* 4, No. 2 MED. MALPRACTICE VERDICTS, SETTLEMENTS & EXPERTS (Feb. 1988) ($75,000 verdict for 24-year-old woman who suffered a vaginal tear and a ruptured cervix during a first trimester abortion and suffered two miscarriages thereafter).

[6] One study has indicated that the medical risks of abortion taken together produce an immediate complication rate of ten percent—that is, physical complications of abortion in 150,000 women annually. Frank, *Induced Abortion Operations and Their Early Sequelae*, 35 J. ROYAL C. GEN. PRAC. 175-80 (Apr. 1985).

[7] *See, e.g., McNair v. Rubin*, No. 4492-81 (N.Y. 1981), *in* 4, No. 2 MED. MALPRACTICE VERDICTS, SETTLEMENTS & EXPERTS (Feb. 1988) ($701,500 verdict for estate of 24-year-old mother of two who died of amniotic fluid embolism after a second dose of saline solution to induce abortion).

[8] A. SALTENBERGER, EVERY WOMAN HAS A RIGHT TO KNOW THE DANGERS OF LEGAL ABORTION 28-32 (1982). *See*, R. Castadot, Md.D., M.H. P., *Pregnancy Termination: Techniques, Risks, and Complications and Their Management, in* FERTILITY & STERILITY 5; G. Wulff, Jr., M.D. F.A.C.O.G. and S. Freiman, M.D., *Elective Abortion Complications Seen In a Free-Standing Clinic*, 49, No. 3 OBSTETRICS & GYNECOLOGY 351 (1976); A. M. Kinball, *Deaths Caused By Pulmonary Thromboembolism After Legally Induced Abortion*, 132 AM. J. OBSTETRICS & GYNECOLOGY 169-74 (Sept. 15, 1978).

[9] Deaths from legal abortion, unlike those from illegal abortion immediately prior to the *Roe* decision, are not made a matter of

be performed in hospitals, doctors' offices, storefront clinics or virtually any place an abortionist chooses to perform the procedure. In 1982, 82% of abortions took place in non-hospital facilities.[10]

Amici contend that abortion on demand has not produced the health bonanza proclaimed by its proponents, but rather has created a public health hazard the scope of which is just beginning to emerge. In addition to the obvious physical complications, abortion has a profound psychological impact upon many women[11] that can be found in the testimonies of women who have undergone abortion. Since the absolute safety of abortion, whether in the first trimester or thereafter, cannot be established, there is no justification for complete deregulation of the procedure. The Commonwealth of Pennsylvania must be allowed to protect the woman considering abortion by

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public notice by the abortion industry. There is incontrovertible evidence from death certificates, police reports, coroner's reports and other sources, however, that at least four women and teenage girls died from legal abortion in Los Angeles County, California alone during 1983 and 1984—23-year-old Cora Mae Lewis, 16-year-old Patricia Chacon, 43-year-old Mary Pena, and 22-year-old Yvonne Tanner. None of these deaths were reported as abortion-related. State of California, Department of Vital Statistics, Death Records, Table A-2, Maternal Deaths by Selected Causes of Death, California, 1960-1984 (By Place of Residence, *in* CALIFORNIA VITAL STATISTICS (1986).

Death from abortion—and failure to report abortion deaths—is not limited to California. In an investigation of only four abortion clinics of the twenty operating in Chicago in 1979, the *Chicago Sun Times* uncovered 12 unreported abortion deaths. D. REARDON, ABORTED WOMEN, SILENT NO MORE 109 (1987) (citations omitted). Even when previously unreported abortion deaths such as those that occurred in Chicago and Los Angeles are uncovered, they are generally not included in the 'official' total since they were not reported as such on the original death certificate. *Id.*, *citing* WILKE, HANDBOOK ON ABORTION 81-92 (1979).

[10] Castadot, *supra* note 8, at 13.

[11] *See* D. REARDON, *supra*, note 9 (the culmination of three years of research and interviews with women who have had abortions).

requiring that she be given an opportunity to give a meaningful consent.[12]

The materials which are to be made available to the woman describe the unborn child, and set forth information concerning alternatives to abortion as well as available assistance with respect to medical benefits, prenatal and neonatal care, childbirth, and the responsibility of the father concerning provision of financial support. Abortion Control Act, § 3205. These materials serve to advance the Commonwealth's interest in giving a woman full information on which to base the decision to receive or reject medical care. Provision of *written* materials enables the woman to review the information at her discretion, permitting reflection and a decision free from the influence of those who have a financial stake in the abortion process.[13]

The information to be provided is factual and in no way serves to mislead, but only to educate the woman in the area of prenatal development.[14] Providing her with relevant physiological data as to the gestational age and development of the unborn child enables a woman to make an informed and voluntary choice based on her own

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[12] To believe that physicians are somehow exempt from human nature and will only act in the interests of others without regard to their own interest is to deny the reality of human nature. The abortion industry is a highly profitable business. The livelihood of the abortionist and her staff depends on the selling of abortions. Certainly any industry which benefits from the sale of a medical procedure is open to regulation.

[13] As pointed out *infra*, Argument, § IV.A., well over three-quarters of abortions take place in non-hospital facilities, including clinics. There is no indication that a traditional long-standing physician-patient relationship is involved. Therefore, it may not be presumed that the abortion provider, who profits by the abortion, is necessarily acting in the best interests of the woman.

[14] *See*, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 85 (6th ed. 1985) (hereinafter "A.C.O.G."), recommending that abortion counseling be followed by an adequate waiting period, to allow reflection on risks and benefits of abortion.

values and beliefs. It informs the woman of the possible health risks of an abortion relative to the gestational age of her unborn child. It permits her to reflect and make a careful balancing of all elements of her decision.

A woman's right to determine her own medical treatment, guaranteed by both common and constitutional law, *Cruzan*, 110 S.Ct. at 2851, is illusory when the only information provider is an entity with a financial interest in a particular outcome of her decisional process, and who supports only one option. The failure to provide complete information on all of her options and the consequences of each choice is closely akin to providing false and misleading information. This serves neither the Commonwealth's compelling interest in protecting the health and welfare of its citizens, nor the woman's own interest in making a voluntary choice based upon complete and accurate data.

The Court in *Akron v. Akron* expressed a concern that informed consent statutes for abortion might dissuade women from choosing abortion. 462 U.S. at 443-45. The very purpose of informed consent, however, is to fully inform the patient, to enable her to make a fully informed choice. Informed consent, by its nature, presumes that she might change her mind, based on her own values and beliefs.[15] This is also the purpose behind product labeling and all consumer protection legislation. Should the prospective abortion patient know less about major surgery than about her choice of breakfast cereal?

If the provision of factual and relevant information reflecting the development of the unborn child as well as available options or alternatives to abortion serves to dissuade a woman from choosing abortion, it is only because in light of all the available information, relative to her own private beliefs and values, the woman has made her own decision. The risk of interfering with a woman's ability to choose her own medical treatment arises only

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[15] The argument that informed consent information which induces a change in opinion *ipso facto* must be coercive is perfectly circular.

where incomplete and biased information is provided, preventing the necessary weighing and balancing of the benefits. That has not taken place here. The Abortion Control Act requires only the sharing of incontestably true information. The dissemination of accurate and relevant information is critical to the woman's exercise of her right to receive or reject medical treatment.

In *Thornburgh*, the Court gutted the 1982 Pennsylvania Abortion Control Act by relying heavily on the notion that "states are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." 476 U.S. at 759. The Court, citing *Akron v. Akron*, asserted that Pennsylvania was doing "nothing less than . . . attempt[ing] to wedge the Commonwealth's message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician." *Thornburgh*, 476 U.S. at 762.

As Justice White wrote in his *Thornburgh* dissent, however,

> . . . *Akron* is not controlling. The informed consent provisions struck down in that case, as characterized by the majority, required the physician to advance tendentious statements concerning the unanswerable question of when life begins, to offer merely speculative descriptions of the anatomical features of the fetus carried by the woman seeking the abortion, and to recite a "parade of horribles" suggesting that abortion is "a particularly dangerous procedure." . . . I have no quarrel with the general proposition . . . that a campaign of state-promulgated disinformation cannot be justified in the name of "informed consent" or "freedom of choice." But the Pennsylvania statute before us . . . does not, on its face, require that the patient be given any information that is false or unverifiable. Moreover, it is unquestionable that all of the information required would be relevant in many cases to a woman's decision whether or not to obtain an abortion.

Id. at 799-800.

Therefore, the statute here suffers none of the "flaws of the ordinance at issue in *Akron* [*v. Akron*]," the basis of the paradoxical *Thornburgh* majority opinion. 476 U.S. at 800 (White, J., dissenting). Even the *Akron v. Akron* majority acknowledged that accurate and relevant information could be constitutionally disseminated:

> The decision to have an abortion has "implications far broader than those associated with most other kinds of medical treatment" . . . and thus the state legitimately may seek to ensure that it has been made "in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient."

462 U.S. at 443 (citations omitted). The Court in *Thornburgh* should have been consistent with its own logic and ruled the Pennsylvania statute constitutional then, but refused, ostensibly because "the subject is abortion." *Thornburgh*, 476 U.S. at 799 (White, J., dissenting). This Supreme Court should remedy that patent inconsistency and uphold the Court of Appeals' finding of constitutionality.

B. The Twenty-four Hour Waiting Period is a Reasonable Device to Ensure That a Woman Has Made a Fully Informed and Well-Reasoned Decision.

Section 3205(a)(1) of the Pennsylvania Abortion Control Act requires a 24-hour waiting period between provision of information and the performance of an abortion. Consent may be given at any time within that period.

Justice O'Connor, in her dissenting opinion in *Akron v. Akron*, joined by Justice White and Justice Rehnquist, stated that "a regulation imposed on a 'lawful abortion' is not unconstitutional unless it *unduly burdens* the right to seek an abortion," 462 U.S. at 453 (citations omitted; emphasis added). According to Justice O'Connor, "'*Roe* did not declare an unqualified "constitutional right to an abortion," . . . Rather, the right protects the woman from unduly burdensome interferences with her freedom to decide whether to terminate her pregnancy.'" *Id.* at 461 (citations omitted; ellipses in original).

It is apparent throughout Justice O'Connor's discussion of the undue burden standard that the burden must be one that essentially prevents a woman from exercising her right to determine her own medical treatment. *Id.* at 464. The 24-hour waiting period does not prevent or unduly burden the woman's ability to decide whether to undergo surgery. It fulfills the Commonwealth's interest, rather, in ensuring that her choice is free and voluntary. It permits time for reflection, further protecting the health and welfare of the mother.[16]

In other related areas, Kentuckians wait 24 hours before consenting to sterilization. KY. REV. STAT. ANN. § 212.347 (Baldwin 1982). Even within a simple sales contract, commonly there is a 3-day waiting period which permits the buyer to rescind after reflection. It would be beyond reason to permit a statutorily imposed waiting period for sterilization, which only revocably terminates reproductive capability, and yet strike down, simply because it impacts abortion, *Thornburgh*, 476 U.S. at 799 (White, J., dissenting), another provision which merely provides the same period for reflection prior to deciding to irrevocably terminate the life of the unborn child of the prospective abortion patient. Such a provision simply provides a woman with essential time for consideration in light of the irrevocable, stressful and emotional decision to abort.[17]

The 24-hour waiting period of the Act must be seen in the light of the lack of the traditional long-term physician-patient relationship, demonstrated *infra*, Argument, § IV.A., and keeping in mind the economic benefit the clinic derives from a woman's decision to have an abortion. It is a valid exercise of the Commonwealth's police

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[16] A.C.O.G., *supra* note 14, at 84.

[17] Though the former is revocable and the latter is not, the distinction between sterilization and abortion actually is not as great as it might seem at first blush. Choosing the former operation is an exercise of the common-law right to receive medical treatment. *Cruzan*, 110 S.Ct. at 2851. Choosing the latter implicates merely the same analysis and standards of protection.

power in protecting its citizens, to insure that the woman have the benefit of all relevant and pertinent information and to insure a voluntary and informed decision.

This reasonable time period, away from the abortion clinic and those who have an economic interest in a choice in favor of abortion, gives the prospective abortion patient time for meaningful reflection free from undue influence or intrusion. Therefore, her decision can be carefully considered, free, and voluntary. The consequences of a woman's decision to abort are lifelong and irrevocable. Her decision should not be one entered into hastily.

III. SECTION 3205 IS A PROPER EXERCISE OF STATE POLICE POWER.

A. Informed Consent Statutes Generally Are a Proper and Legitimate Exercise of State Police Power.

Through § 3205 of its Abortion Control Act, the Commonwealth of Pennsylvania protects the health of women within its jurisdiction. This is a legitimate exercise of an integral aspect of the Commonwealth's police power, the authority to protect public health. This power of the Commonwealth to regulate the medical field is indisputable. *See, e.g., Whalen v. Roe*, 429 U.S. 589 (1977); and *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40 (1926).

> [I]t is elemental that a state has broad powers to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health.

Barsky v. Board of Regents, 347 U.S. 442, 449 (1954).

A necessary component of regulating the medical field is enforcing the patient's right to informed consent.

> "The decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the

> State to the extent of requiring her prior written consent."

Akron v. Akron, 462 U.S. at 442-43, *quoting Danforth*, 428 U.S. at 67. "Informed consent," according to the *Danforth* Court, means "the giving of information to the patient as to just what would be done and as to its consequences." *Danforth*, 428 U.S. at 67, n.8.

State legislatures nationwide have rejected the idea that the physician is permitted to disclose just that information which she deems relevant. Instead, these statutes respect the patient and her ability to make a self-determined decision. To do less in the case of abortion is to belittle the capacity of a woman to make a knowing, rational, and willing choice to terminate the life of the unborn child which she carries.

B. Medically Specific Informed Consent Statutes Are Rationally Related to the Commonwealth's Legitimate Interest and Serve the Woman's Need for Information.

The movement toward providing greater quantity and quality of information for patients' informed consent decisions has also resulted in a parallel movement toward medically specific informed consent statutes. Pennsylvania has undertaken specific informed consent provisions for breast cancer treatment, 35 PA. CONS. STAT. ANN. § 5641, and prenatal examination for syphilis, 35 PA. CONS. STAT. ANN. § 521.13. Likewise the statute under consideration, Pennsylvania Abortion Control Act § 3205, requires specific informed consent regarding abortion. This is not an aberration, but is in keeping with the trend toward more fully tailored, medically specific informed consent.

In *Danforth*, this Supreme Court recognized Missouri's legislative prerogative to require a woman to sign a consent indicating that it was "informed and freely given and not the result of coercion." *Id.* at 65. The Missouri statute was applicable during all stages of pregnancy and was *medically specific*. This Court upheld the statute:

> [T]he imposition . . . of such a requirement [informed consent] for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

Id. at 67.

This Supreme Court in *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976), *aff'g. Planned Parenthood v. Fitzpatrick*, 401 F.Supp. 554 (E.D. Pa. 1975), approved the Commonwealth of Pennsylvania's informed consent legislation the same year as *Danforth*. The District Court found that the requirement was rationally related to the Commonwealth's interest. The Commonwealth's requirement that the information be given "is suggested . . . by the realities of the system that provides abortions." *Planned Parenthood v. Fitzpatrick*, 401 F.Supp. at 587 (Adams, J., concurring). The Court correctly held that the three disclosure requirements of the statute (of possible unforeseen detrimental physical and psychological effects; of possible alternatives to abortion, including childbirth and adoption; and of the medical procedures to be used), were within the prerogative of the Pennsylvania state legislature. *Id.* at 587-88.

The tailoring of the Pennsylvania Abortion Control Act provides the basis upon which a woman can make a truly informed decision. This is especially critical here, for "abortion has implications far broader than those associated with most other kinds of medical treatment." *Akron v. Akron*, 462 U.S. at 443 (citations omitted). *See also, id.* at 448, where the *Akron v. Akron* majority characterized the abortion decision as "stressful." To do less than inform a woman of the full extent of her right to receive or reject medical treatment would work a gross injustice. Denial of this right of the woman

would be a patronizing denigration of a woman's ability to function as a fully competent adult in society. It would be a dereliction of the Commonwealth's duty to safeguard the public health.

C. The Commonwealth's Legislature, Through Its Police Power, Is the Proper Authority to Review the Issue of Informed Consent.

Informed consent statutes are a fundamental function of the police power of the Commonwealth.

> [T]he government is entitled not to trust members of a profession to police themselves, and accordingly the legislature may for the most part impose such restrictions on the practice of a profession or business as it may find necessary to the protection of the public.

Thornburgh, 476 U.S. at 803 (White, J., dissenting). *See also, id.* at 760 (Blackmun, J., writing for the majority).

Not until 1983, ten years after *Roe*, did the Court overrule a legislative body's determination of the content of informed consent disclosure. In *Akron v. Akron*, the Court ruled that the ordinance passed by the City of Akron was unconstitutional. The Court used the standard of "strict scrutiny" without finding the chilling effect required under prior rulings, however. As Justice O'Connor wrote, "[t]he Court's analysis of the Akron regulations [was] inconsistent . . . with the methods of analysis employed in previous cases dealing with abortion . . ." 462 U.S. at 452-53 (O'Connor, J., dissenting).

The Court in *Akron v. Akron* erroneously appointed themselves an "ex-officio" medical board to review the determination of state legislatures as to medical regulation of the abortion industry. *Cf. Danforth*, 428 U.S. at 99 (White, J., concurring). This standard incorrectly makes the state subservient to the abortion industry, thereby allowing the abortion industry to be, in effect, self-regulating. *Akron v. Akron*, 462 U.S. at 431. A clearly defined rationale for this concept is nonexistent.

This is not the function or place of a court.

> [A]lthough legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

Id. at 458 (O'Connor, J., dissenting). Rather than emplace itself as Pennsylvania's "medical review board," this Supreme Court

> must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, 'the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' "

Id. at 465 (O'Connor, J., dissenting; citations omitted).

In *Thornburgh*, the *Roe* majority again injected itself into the regulation of State medical practices. The Court found the medical judgments of the legislature of the Commonwealth of Pennsylvania "overinclusive," 476 U.S. at 762, "irrelevant and inappropriate," *id.* at 763, and "facially unconstitutional," *id.* at 764. Chief Justice Burger posed questions begging for answers:

> Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?

Thornburgh, 476 U.S. at 783 (Burger, C.J., dissenting).

The teaching of this Supreme Court is clear: informed consent requirements are a legitimate regulation of every aspect of the medical profession, abortionists not excepted. Even under the prior holdings of the *Roe* majority, in-

formed consent statutes which mandate merely factual disclosure, as the Pennsylvania Act does, are acceptable. Therefore, the Pennsylvania Abortion Control Act should be upheld as constitutional.

IV. PENNSYLVANIA'S INFORMED CONSENT PROVISIONS DO NOT VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION.

A. The Provisions Regulate Commercial Speech.

Abortion clinics provide a service for a price. Abortion is almost always an elective procedure.[18] Over 80% of abortions are performed in clinics that limit themselves to one primary function only.[19] The vast majority of abortions do not take place in the context of a traditional physican-patient relationship in which the procedure is decided upon in light of the long-range health needs of the patient. Typically, the woman arrives at the clinic and undergoes an abortion in one stop. Like one-hour eyeglass outlets at retail malls, abortion clinics are engaged in a commercial activity.[20]

Regulations on commercial speech do not need to pass a strict scrutiny or clear and present danger test. The appropriate level of scrutiny has been most recently defined by the Supreme Court as

> a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed.

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[18] Less than two per cent of abortions are for clinical reasons. Torres & Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP. 169 (1988). Since Pennsylvania's informed consent requirements do not apply to medical emergencies, they will apply almost entirely in cases where the woman is seeking an elective service for a fee.

Board of Trustees v. Fox, 492 U.S. at 480 (citations omitted).

The objective of the informed consent provisions is to provide a pregnant woman with sufficient data upon which to make an informed choice. She may decide as she pleases, based upon her own values. The means chosen by the Commonwealth of Pennsylvania to effectuate that legitimate end is to ensure that the prospective abortion patient receive fact-specific information regarding the medical aspects of the procedure and the social and legal variables relevant to making her decision.

The fit between the means and the legitimate State end is obvious. The information provided to the woman describes the risks of abortion as well as the risks of childbirth. It delineates the "probable gestational age of the unborn child," § 3205, a relevant factor in terms of both the safety of the abortion and the time needed to carry the unborn child to term. It also describes alternatives to abortion, as well as medical assistance and legal options available to her. In sum, it allows her to become an informed consumer.

The legislation is not a regulation of political speech, it does not control speech in a traditional or designated public forum, and it does not operate as a prior restraint upon speech. Under the rules governing commercial speech, the Commonwealth may require the purveyor of a commercial service to disseminate information that the Commonwealth reasonably believes will assist the consumer in making an informed choice. In situations where the provider of services has far greater access to relevant information, and where the consumer is at an arguable

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[19] Henshaw, Forrest, & Van Vort, *Abortion Services in the United States*, FAM. PLAN. PERSP., Mar.-Apr. 1987 at 68.

[20] Abortion clinics advertise their services; they normally set a standard price for their services; they limit themselves to a particular standard service; and they have an economic motivation for their actions. They are, in sum, engaged in a commercial activity, no matter what ideological incidents may accompany the transaction. *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 67-68 (1983).

disadvantage in weighing the options of accepting the service or not, the Commonwealth can compel greater disclosure, even if it works to the ultimate disadvantage of the seller.

As the Court explained in *Zauderer v. Office of Disciplinary Counsel*, the Commonwealth "has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." 471 U.S. 626, 650 (1985).

As with other regulations of commercial transactions, from advertisements of cigarettes, to the selling of homes, to the promotional literature of lawyers, there is indeed a clear "fit" between the information that must be given to the potential consumer and the objective, to provide a potential consumer of goods or services with sufficient knowledge to make a rational choice. *Board of Trustees v. Fox*, 492 U.S. at 480. In fact, this Supreme Court has held that where a state is seeking to prevent a consumer from being misled, all that is needed is a "reasonable fit" between the means and the "substantial" goal. *Id.*; *see also, Zauderer*, 471 U.S. at 625.

B. Pennsylvania May Validly Compel the Dissemination of Information Necessary to Assist a Woman's Exercise of Her Right to Refuse Medical Treatment.

In *Cruzan v. Missouri Dept. of Health*, this Supreme Court held that "the common law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." 110 S.Ct. at 2851. The Court further noted that the refusal of unwanted medical treatment is "a constitutionally protected liberty interest" rooted, at least in part, in the common law protection against battery. *Id.*

The federal government, under its implied powers, and the states, under their police power, possess acknowledged authority to require the dissemination of accurate information so that individuals may more effectively exercise their statutory and common law rights, as virtually any

worker in this country can attest.[21] The State, in particular, has special competence in regulating the provision of health services to its people. *Barsky v. Board of Regents*, 347 U.S. at 449.

There is no constitutional objection to the plethora of specific informed consent state statutes dealing with breast cancer treatment,[22] electroconvulsive treatments,[23] prenatal examination for syphilis,[24] HIV tests,[25] communicable diseases,[26] experimental research,[27] services of a midwife,[28] or a 24-hour waiting period for nontherapeutic sterilizations.[29] Nor should there be for a procedure fraught with such potentially devastating outcomes as abortion. *See*, *supra*, Argument, § II.A.

The manner in which the State of California deals with the medical procedure of hysterectomy is instructive. Before a woman may undergo the surgical removal of her uterus, California law requires that the attending physician must first obtain verbal and written informed con-

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[21] *See, e.g.*, D.C. CODE ANN. § 36-1311 (requiring posting of Employees' Rights under the District of Columbia Family and Medical Leave Act of 1990); Employee Polygraph Protection Act, WH Publication 1462, U.S. Dept. of Labor, September 1988; "Your Rights Under the Fair Labor Standards Act," WH Publication 1088, U.S. Dept. of Labor, Rev'd April 1991.

[22] N.Y. PUB. HEALTH LAW § 2404 (Consol. 1992); 35 PA. CONS. STAT. ANN. § 5641 (1983 and Supp. 1991). See also the debate within the Food and Drug Administration regarding whether silicone breast implants should be banned or allowed with the required informed consent of the patient. News Briefing by David Kessler, Federal News Service, January 6, 1992, LEXIS.

[23] COLO. REV. STAT. § 13-20-402 (1991).

[24] 35 PA. CONS. STAT. ANN. § 521.13 (1983 and Supp. 1991).

[25] OHIO REV. CODE ANN. § 3701.242 (Baldwin 1991). ARIZ. REV. STAT. ANN. § 20-448.01 (1992).

[26] IND. CODE ANN. § 16-1-9.5-3 (Burns 1991).

[27] MINN. STAT. § 144.651 (1990 and Supp. 1991).

[28] MONT. CODE ANN. § 37-27-311 (1991).

[29] KY. REV. STAT. ANN. § 212.347 (Baldwin 1992).

sent from the woman attesting that she has been given specific information, including, *inter alia*,

> (2) A description of the type or types of surgery and other procedures involved in the proposed hysterectomy, and a description of any known available and appropriate alternatives to the hysterectomy itself;
>
> (3) Advice that the hysterectomy procedure is considered to be irreversible, and that infertility will result: . . .
>
> (4) A description of the discomforts and risks that may accompany or follow the performing of the procedure, including an explanation of the type and possible effects of any anesthetic to be used.

CAL. HEALTH & SAFETY CODE, § 1690 (Deering 1991).

Additional information given to the woman contemplating a hysterectomy includes details of her right to withdraw agreement to the operation at any time, the benefits and advantages of the treatment, length of hospitalization and recovery, and costs. It seems beyond peradventure that informing a woman of the implications and alternatives to the removal of her unborn child and the elimination of any possibility of her child being born is as reasonable and justified as informing her of the implications and alternatives to removing her uterus and the closure of any possibility of having children.

Amici have noted above that Pennsylvania's statute is a valid form of consumer protection legislation, regulating the incidents of a commercial transaction. More importantly, however, the statute also furthers the right of patients to give complete informed consent, rooted in their common law right to refuse medical treatment.

Despite their protestations, abortion clinics are neither equipped nor, absent this statutory motivation, are they motivated to give each woman particularized information for her specific situation. Such a possibility is chimerical in the one stop, homogenized procedure experienced by most of those who arrive at the clinics' doors. The Commonwealth has found that it must provide the umbrella

of information under which a woman may make a reflective and reasoned decision. This Supreme Court should uphold that provision.

C. Pennsylvania's Informed Consent Legislation Does Not Compel the Physician to Endorse an Ideological Position of the Commonwealth.

Under § 3205 of the Pennsylvania Abortion Control Act, a physician is required to provide three pieces of neutral and balanced information: 1) the type of treatment, its alternatives and risks; 2) the gestational age of the unborn child; and 3) the medical risks in carrying a child to term. The physician is not compelled to say anything more on these matters. There is no more "ideological message" in describing the risks and alternatives to abortion than there is in describing the risks and alternatives to an HIV test, a breast implant, or a hysterectomy.

The regulations do not intrude upon a physician's First Amendment rights. The government may compel a provider of services to engage in relevant commercial speech to present the truth to individual consumers.[30]

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[30] While it is settled law that the government may not conscript a person to proclaim its own ideological message, *Zauderer*, 471 U.S. at 625; *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977), that is not occurring here. The information which the physician must impart is merely factual. Any ideological message to be drawn from the provision of this information is thus only drawn from the bare fact of its provision.

The petitioners object to this statutory duty. Brief for Petitioners, *Planned Parenthood v. Casey*, Nos. 91-744, 91-902, 60 U.S.L.W. 3492 (U.S., 1992) at 51-55. They did not and could not allege, however, that the information to be presented was false. Rather, petitioners object that compelling dissemination of unarguably true material to a consumer of services "violates [the] conscientious beliefs and professional commitments" of Pennsylvania abortionists. *Id.* at 54.

Truth is thereby reduced by the petitioners to a mere "ideological point of view," *id.* at 54, citing *Wooley*, 430 U.S. at 715, antithetical to their own ideology. One must wonder how truth could violate the "conscientious beliefs," *id.* at 54, of honest physicians. One must

In *Thornburgh*, Justice O'Connor stated that the informed consent regulations in that case were "the kind of balanced information I would have thought all could agree is relevant to a woman's informed consent." 476 U.S. at 830 (O'Connor, J., dissenting). Though Justice O'Connor was concerned that "requiring the physician or counselor to read aloud the State's printed materials . . . raises First Amendment concerns," *id.*, this statute does not partake of that infirmity. All the physician must do is provide the potential patient with factual, relevant information. This remains a regulation of commercial speech, and any political nuances drawn from the Commonwealth's requirements are merely incidental. *Board of Trustees v. Fox*, 492 U.S. at 475, *citing Bolger v. Young*, 463 U.S. at 67-68.

Beyond divulging the limited factual information on risks, alternatives, age of the unborn child, and dangers attendant in pregnancy, the specific content of which the physician's own professional judgment determines, the physician may express any opinion on the woman's condition that she wishes. She is given no ideological script to read. She may opine that it is in the woman's best interests to have an abortion. She may criticize this very law. She may even recommend that she ignore the state mandated printed materials. In sum, her only obligation is to provide factual information material to whether the consumer wishes to avail herself of the proffered medical services. By thus allowing the prospective patient to be informed, the Commonwealth empowers her with information on which to base her decision whether to accept or refuse the available medical treatment.[31]

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inquire why such an honest provider of medical services would wish to "disavow," *id.* at 53, the truth.

[31] Amici wish to emphasize that the issue is not that the woman does not have enough native intelligence to decide for herself; that is Petitioner's argument. Rather, amici argue that, at a time of emotional and psychologocial stress, a prospective abortion patient is unlikely to seek out information which is not readily available. The Act makes this information available for the woman's review and use.

V. THE INFORMED CONSENT PROVISIONS OF THE PENNSYLVANIA ABORTION CONTROL ACT LEAVE THE WOMAN FREE TO DETERMINE WHETHER TO OBTAIN AN ABORTION OR CARRY HER PREGNANCY TO TERM.

Although a state may constitutionally encourage childbirth over abortion, *Maher v. Roe*, 432 U.S. 464 (1977), under this statute, Pennsylvania has left the decision of birth or abortion to the individual woman.[32] The Commonwealth has insured that, no matter what the woman's first inclination in submitting to a medical procedure about which she may know little, she cannot be induced to "move forward on a decision to abort without evaluating that decision on an informed basis." *Planned Parenthood v. Casey*, 947 F.2d at 704 n.16. As Justice White noted in *Thornburgh*,

> [t]rue consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.

476 U.S. at 799 (White, J. dissenting), *quoting Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972).

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[32] Although the legislation refers to the "unborn child," that characterization is no more legally enforceable than was Missouri's finding that "[t]he life of each human being begins at conception," and that "[u]nborn children have protectable interests in life, health, and well-being." *Webster*, 492 U.S. at 500. Nonetheless, absent the constraints of *Roe v. Wade*, there is adequate evidence for the Commonwealth reasonably to conclude that the unborn child is a human person. Constrained by *Roe*, Pennsylvania has not chosen in this legislation to accord the unborn child full personblood status under its law. Indeed, it could not grant the unborn child personhood and still provide that, once the woman has received the information and has had time to consider it, she may still choose to abort.

To presume, as did the Court in *Akron v. Akron*, that the physician will tailor the individual information to the needs of the patient is to rely upon a fiction in the abortion context. *See, supra*, Argument, § IV.A. There is hardly any individuation in an abortion clinic. Many women do not see the physician until the operation is about to begin.

What the *Akron v. Akron* majority did was to exalt the discretion of the physician over the needs of the patient. It left a constitutionally protected total veto over the consent process in the hands of the person performing the abortion, who has an economic interest in insuring that the patient proceed with the operation. Pennsylvania has merely righted that imbalance in favor of the patient.[33]

That trend so explicitly embraced in *Akron v. Akron* by the Court should now be ended, and constitutional jurisprudence returned to its traditional underpinnings. In light of the growing evidence of what actually occurs in this fictionalized "physician-patient relationship" in abortion clinics, in light of the scientific support for the state to prefer childbirth, and in light of the new standards articulated by this Supreme Court in *Webster*, *Hodgson*, and *Ohio v. Akron*, it is clear that *Akron v. Akron's* unduly restrictive notion of state action in regard to physicians sharing the truth with their prospective patients can no longer be supported as a matter of constitutional law.

Nonetheless, in the present statute, the fact remains that the state has not forced an unwilling listener to hear its message of the virtue of childbirth. Instead, it merely requires that, beyond the limited technical information provided by the attending physician, the woman must receive certain materials. The materials describe abortion alternatives and legal and social opportunities for the woman, but they do not contain the hortatory message that was the defective part of the statute struck down in

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[33] By this provision we are a long way from *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and interference with the right of a person to pursue her lawful calling unhampered by the state.

Thornburgh. Even though these materials are absolutely neutral and accurate, the woman is not required to read them.

To the extent these neutral facts carry the "message" of the Commonwealth's preference of childbirth over abortion through the provided material, they do so through the intervention of the woman's own value system. She reads the facts—if she chooses to do so—and she draws the conclusions. The Commonwealth of Pennsylvania respects the values and independent judgment of the woman more than do those who would deprive her of relevant information vital to a decision of the greatest import to her life.

CONCLUSION

Amici respectfully urge the Supreme Court to uphold the rights of women to receive the information necessary to make a free, voluntary, and considered decision regarding a most important medical issue. The resistance of Petitioners to the dissemination of truthful material to women considering the abortion option is nothing less than a paternalistic and condescending effort to control the destinies of women—a measure most strongly protested by amici representing women from all walks of life.

This Abortion Control Act does not partake of the constitutional flaws that caused the *Roe* majority to find invalid the informed consent provisions in *Akron v. Akron* and *Thornburgh*. There is no "parade of horribles." There are no "tendentious statements concerning the unanswerable question of when life begins" or "speculative descriptions of the anatomical features of the fetus." *Thornburgh*, 476 U.S. at 800 (White, J., dissenting). Rather, § 3205 of the Abortion Control Act mandates empirically verifiable scientific data and information about government programs to be shared with women seeking abortions.

The goal of this dissemination? The Commonwealth of Pennsylvania seeks to empower its citizens to exercise their common-law and constitutional right to receive or reject medical treatment. As long as abortion is legal,

women must receive full and complete information to enable them to make a voluntary and informed choice.

This statute in no wise violates the rights of the outstanding medical community of the Commonwealth of Pennsylvania. The speech which is implicated by this statute is commercial speech, incontestably entitled to a lower level of protection than other forms of speech. *Board of Trustees v. Fox*, 492 U.S. at 480-81. Giving women the information they need to make a fully informed consent is certainly a "substantial" goal of the Commonwealth. This program of information dissemination has an unarguable "reasonable fit" to meet that goal. *Id.*

Therefore, this Court should affirm the holding of the Third Circuit Court of Appeals, and find that § 3205 of the Pennsylvania Abortion Control Act is constitutional. Amici respectfully urge, however, in agreement with Justice Scalia, that "[t]he real question . . . is whether there are valid reasons to go beyond the most stingy possible holding today." *Webster*, 492 U.S. at 534.

In its grant of certiorari in this case, this Supreme Court specifically limited its review to the constitutionality of the state regulatory provisions of the Pennsylvania Abortion Control Act. *Planned Parenthood v. Casey*, Nos. 91-744, 91-902.

Amici contend that the Third Circuit Court of Appeals was correct to apply the case of *Marks v. United States* to arrive at the proper standard of review. *Planned Parenthood v. Casey*, 947 F.2d at 692-96. However, amici also agree with the amicus briefs in support of the Commonwealth of Pennsylvania's petition for writ of certiorari which state that this Supreme Court is not bound by *Marks*, and can and should enunciate a clear standard of review in this overwhelmingly critical area of constitutional jurisprudence.

As the Third Circuit correctly stated, the

> threshold question is whether the standard of review of abortion regulations promulgated by the Court in

> *Roe* and later cases . . . has survived *Webster* and the Court's subsequent decision in *Hodgson v. Minnesota* . . . . [T]he standard of review used for abortion legislation establishes the degree to which the government may regulate abortion.

Planned Parenthood v. Casey, 947 F.2d at 687-88 (citations omitted).

Whether the "right" to abortion is "fundamental," and thus whether the "strict scrutiny" test is applicable, depends therefore on a continuation of the *Roe* rationale or some similar construct. As Justice White has written, however, joined by (now Chief) Justice Rehnquist, the stability of *Roe* has been brought into question:

> Both the characterization of the abortion liberty as fundamental and the denigration of the State's interest in preserving the lives of nonviable fetuses are essential to the detailed set of constitutional rules devised by the Court to limit the States' power to regulate abortion. If *either or both* of these facets of *Roe v. Wade* were rejected, a broad range of limitations on abortion (including outright prohibition) that are now unavailable to the States would again become constitutional possibilities.

Thornburgh, 476 U.S. at 796 (White, J., dissenting; emphasis added). Thus, it is imperative that this Court examine the foundations of the *Roe* structure explicitly to determine the correct standard of review of the regulatory provisions of the Pennsylvania Abortion Control Act.

Respectfully submitted,

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